



Liens and Bonds: The one-two punch

Presented by

Gary Quinnett and Charles Johnson

June 27, 2012

Presented to

THE AGC of Oklahoma

The Associated General Contractors of America, Inc.,

GOALS OF SEMINAR

- Provide overview of liens and bonds: who, what, when, where, why and how.
- Identify time-sensitive, key actions.
- Adopt the “avoiding loss” mindset.

WHAT IS THE IMPACT OF A BAD DEBT?

- Assume a \$100,000 write off to your company's P&L because of an uncollectable debt
- It takes your company \$500,000 in revenue to offset that loss, assuming a 20% margin

INTRODUCTION: OKLAHOMA MECHANICS' LIENS

- Provides protection from financial loss to contractors, subcontractors and materialmen in private construction.
- That provide labor or materials used in the construction, alteration or repair of buildings, structures or improvements (broad interpretation).
- Converts unsecured debt into secured debt.
- Triggers "event of default" on mortgages.
- Attorney's Fees often paid.

DEFINITIONS

- Contractor: person enters into an agreement with the property owner or owner's duly authorized agent.
- Subcontractor: person who enters into an agreement with person who has already contracted for its performance.
- Materialman: person that agrees to furnish materials, knowing of contract between property owner and contractor, and materials are used in construction.
- One that supplies both labor and materials is a contractor/subcontractor.
- Lien claimant is one who has filed a lien.

QUINNETT
ATTORNEYS & COUNSELORS AT LAW

DO THIS BEFORE YOU FILE A LIEN

- Check Oklahoma Secretary of State records:
 - *Ensure that your entity is in good standing*
 - *Ensure that your Registered Agent is accurate*
 - *Check debtors name and address (commercial debtors)*
- Check County Assessor records:
 - *Determine legal description of property (description typically found on property card)*
 - *Determine property owner name and mailing address*
 - *Determine proper county*
- Determine whether debtor has a counter claim (we want clean hands)
- Consider all options, e.g. file lien and agree not to foreclose if promissory note is honored; e.g. property swap in exchange for debt

COMPUTATION OF TIME

- Completion of work determines commencement of time for computing period for filing mechanics' liens and notices.
- Repairs of defects are not "completion of work."
- Use actual date of last work, not date of invoice.
- Months mean months (for example, contractor must file lien within four (4) months of completion of work; work completed on February 4; lien must be filed by June 4).
- Days mean days (you must include all weekends and holidays; don't include the day the work completed;) (for example, subcontractor must file lien within ninety (90) days of completion of work; work completed on February 4; lien must be filed by May 5).

STEPS FOR ALL MECHANICS' LIENS

- Lien filed in the office of the County Clerk where the property is located.
- County Clerk will record the lien
- Within five (5) business days, County Clerk will send notice of the lien to the property owner via certified mail, return receipt requested.
- Check and doublecheck the lien amount—cannot be changed
- Be truthful about all facts on lien statement; felony to falsify a lien

QUINNETT
ATTORNEYS & COUNSELORS AT LAW

CONTRACTOR'S LIEN

- Pre-Lien Notice sent to Property Owner within seventy-five (75) days of the date equipment was last furnished or labor last performed. Notice must be sent certified mail, return receipt requested.
- Pre-Lien notice not required for jobs of less than \$10,000.00
 - *Ensure that you receive certified mail, return receipt for Property Owner*
- Lien Statement must be filed within four (4) months of the date equipment was last furnished or labor last performed.
- Affidavit Regarding Pre-Lien Notice filed at the same time as the Lien Statement.
- Ensure that County Clerk received certified mail, return receipt for Property Owner.

QUINNETT
ATTORNEYS & COUNSELORS AT LAW

SUBCONTRACTOR'S LIEN

- Pre-Lien Notice sent to Property Owner and Contractor within seventy-five (75) days of the date equipment was last furnished or labor last performed. Notice must be sent certified mail, return receipt requested.
- Pre-Lien notice not required for jobs of less than \$10,000.00
 - *Ensure that you receive certified mail, return receipt for Property Owner and Contractor*
- Lien Statement must be filed within ninety (90) days of the date equipment was last furnished or labor last performed.
- Affidavit Regarding Pre-Lien Notice filed at the same time as the Lien Statement.
- Ensure that County Clerk received certified mail, return receipt for Property Owner and Contractor.

WORK ON LEASED PROPERTY

- In order to file a lien, contractor must have a contract with the legal owner or agent. A contract with lessee leaves contractor with virtually nothing.

PRIORITIES

- Among lien claimants, pro rata share
- Lien claimants vs. Mortgagee (bank)
- Mortgage rights are superior if valid mortgage filed before project begins

ENFORCEMENT OF LIEN

- Must be filed within one (1) year.
- All entities with an interest in the property must be joined.
- Attorneys fees awarded to prevailing party.
- The lien claimant that has the largest claim usually takes the lead in lien foreclosure action
- Debtor can bond around lien or Quiet Title.

WHAT IF LIEN RIGHTS EXPIRE?

- Breach of contract
- Negligence
 - *Two (2) years from when harm occurred*
- Attorneys fees generally not awarded

EFFECT OF BANKRUPTCY FILING

- Lien claimant may file the lien after the bankruptcy petition is filed, assuming within time

NEGATIVE LIEN CLAUSE

- Add negative lien clause to all private contracts
- Resist negative lien clauses with those you contract

RELATIONSHIP BETWEEN LIENS AND BONDS

- Today, even private owners who are subject to liens on their property often use payment bonds to obtain protection against liens.
- Often GC will require its subs to provide payment bonds to protect against liens. GC is the obligee and sub is the bond principal.

OVERVIEW: BONDS

- Surety Bonds:
- Contract Bonds (bid bonds, performance bonds, payment bonds, maintenance bonds, advance payment bonds, and supply bonds)
- Noncontract bonds (judicial bonds, license and permit bonds, public official bonds)
- Liens cannot be placed on public property

BONDS: DEFINITIONS

- bid bonds
- performance bonds
- payment bonds
- maintenance bonds
- advance payment bonds
- supply bonds

BONDS

- Think of it as applying for a loan
 - *personal financial statement often required*
 - *underwriters heavily scrutinize principal's reputation*
- Ensures that the principal is solvent
- Sureties don't take losses

BONDS

- Three-party relationship
 - Principal (general contractor; one who has assumed a contractual undertaking)
 - Obligee (owner; one who is due benefits of principals performance)
 - Surety (provides the bond and secondarily guarantees performance of principal's undertaking)
 - Principal-contractor purchases a bond pursuant to contract with owner-obligee.
 - Cost of bond passed on to owner-obligee

PUBLIC CONTRACTS

- Miller Act (federal public contracts)
 - Restricts coverage to first and second tier claimants; Lenders generally cannot attach bond
 - Claimants must do work "on site"
 - Lenders generally cannot attach bond
 - Subcontractors are not required to give notice
 - Sub-subcontractors must give 90 day notice to principal contractor
- Little Miller Act (Oklahoma public contracts)
 - Who can make a claim? Every party that furnished labor or materials
 - Notice? 90 day notice required of sub subs
 - When must a claim be filed?

PAYMENT BONDS

- Payment bond generally limits claimants on the bond to those having direct contract with the principal or with a subcontractor of the principal
- Obligee cannot make a claim on payment bond but looks to performance bond if the contractor fails to complete project

EFFECT OF BANKRUPTCY

- Claimant cannot proceed to attach bond after bankruptcy petition is filed

HEADS UP!

- Oklahoma Trust provision. Make sure that you pay the subs when client releases the funds to you.
- Change Orders
 - *Most frequent source of problems are failure to document change orders (what does change do to completion date and price?)*

CONTACT INFORMATION

- Gary Quinnett
 - Law Offices of Gary David Quinnett, PLLC
 - Dillard Group Building, 1800 North Interstate Drive, Suite 230, Norman, OK 73072
 - (405) 312-1331; gary@gq-law.com
- Charles Johnson
 - Overman Insurance Agency, LLC
 - Dillard Group Building, 1800 North Interstate Drive, Suite 220, Norman, OK 73072
 - (405) 310-2020; charles@oigok.com